



# CHAPTER ONE

## Investigation

### I. The Role of Law Enforcement

Law enforcement agencies have powers of investigation unavailable to any other agency. This authority must be used appropriately in order to obtain evidence that will be admissible in a criminal case. The following discussion provides Virginia law on the most commonly used investigative tools for law enforcement.

#### A. Search Warrants (BACIGAL at §§ 4–4 through 4–16):

Child abuse investigators frequently use two types of warrants in their investigations. One type of warrant is the expertise warrant, in which probable cause to search a person's residence is based on the professional opinion of an expert who indicates why certain items will be at the person's residence. For example, an expert in the field of child molestation may testify that a pedophile is highly unlikely to throw away child pornography, and therefore that child pornography delivered to an individual in the past is probably still in that person's possession. Virginia courts have not addressed the validity of expertise warrants per se, but the Virginia Supreme Court has upheld an affidavit that took into account past sexual deviation by the defendant. *Drumheller v. Commonwealth*, 223 Va. 695, 292 S.E.2d 602 (1982), *cert. den.*, 459 U.S. 913 (1982).

The second type of warrant, the anticipatory warrant, is “a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.” 2 Wayne R. LaFare, SEARCH AND SEIZURE §3.7(c) (Third edition 1996). Such warrants are particularly appropriate for use in child pornography investigations when investigators know child pornography will be delivered to a particular location at a particular time, and are valid in Virginia so long as there is probable cause to believe that the contraband will be on the premises at the time the warrant is executed. *McNeill v. Commonwealth*, 10 Va. App. 674, 677, 395 S.E.2d 460, 463 (1990) (anticipatory warrant based on tip from out-of-state authorities about delivery of cocaine to defendant's home). It is sufficient for purposes of establishing probable cause to show that the contraband is on a “sure course” to the premises at the time the warrant is requested. *Id.* at 677, 395 S.E.2d at 463. Proof that the contraband is in the mail and will be delivered to suspect's residence is sufficient proof of the “sure course” element. *Id.* at 678, 395 S.E.2d at 463. However, where the information provided for the affidavit to support an anticipatory search warrant was not sufficiently precise to identify when the contraband to be seized would be at the site described in the search warrant or how the affiant knew of the date, the warrant is invalid. *Colaw v. Commonwealth*, 32 Va. App. 806, 812, 531 S.E.2d 31 (2000).

Even though the warrant authorizing the search of defendant Moyer's apartment at a military academy where he taught might have been deficient, the seizure of his diaries containing photographs mentioned in the diaries, which journals described inappropriate activities involving juvenile students was legal and the motion to suppress was properly denied. *Moyer v. Commonwealth*, 33 Va. App. 8, 531 S.E.2d 580 (2000) (*rehearing en banc*), *reversing* 30 Va. App. 744, 520 S.E.2d 371 (1999).

B. Pretext Conversation Recordings and Electronic Surveillance (BACIGAL at §§5-1 through 5-6; FRIEND AT §14-10).

One effective investigative technique is to request the victim to call the perpetrator on the telephone and record the conversation. *See* MANUAL, Chapter Two, part V.D. Although the issue of such one-party consent recordings of telephone conversations between a victim and accused has not been specifically addressed in child sexual abuse cases, the practice was held constitutional in *Cogdill v. Commonwealth*, 219 Va. 272, 247 S.E.2d 392 (1978) (telephone call in which defendant offered female adult caller money for sex). *See also* Va. Code Ann. §19.2-66 (authorizing the Attorney General to seek a court order to intercept communications while investigating the felonies of extortion, bribery, kidnapping, murder, any felony violation of §§18.2-248 or -248.1, any felony violation of Chapter 29 of Title 59.1, any felony violation of Article 2.2 of Chapter 4 of Title 18.2, or any conspiracy to commit any of the specified offenses).

For a discussion of the use of electronic surveillance to investigate child abuse, *see* MANUAL, Chapter Two, part VI.D. For a discussion of the use of electronic or Internet surveillance in Virginia, *see* BACIGAL at §5-1. In *Bloom v. Commonwealth*, 262 Va. 814, 554 S.E.2d 84 (2001), the Supreme Court of Virginia upheld the conviction of a man for attempting to take indecent liberties with a child and solicitation to commit sodomy where the police monitored the man's Internet communications with a 13-year-old girl and set up a meeting where he was arrested (*affirming* the decision of the Court of Appeals found at 34 Va. App. 364, 542 S.E.2d 18 (2001)). The evidence established the identity of the defendant as sender through his "screen name," personal details communicated in the messages, and other facts that matched the defendant. In *United States v. Jarrett*, 229 F.Supp.2d 503 (E.D.Va. 2002), the United States District Judge denied a motion to suppress Internet pornography evidence obtained by a foreign Internet user who had gained unauthorized access to defendant's computer.

C. Social Worker Involvement in Interrogation.

Section 63.2-1503.M. of the Code provides that no statement made by a person after his or her arrest to a child protective services worker regarding the abuse or neglect of a child shall be admissible unless the person is first advised of his or her Miranda rights. In *Terry v. Commonwealth*, 30 Va. App. 192, 516 S.E. 2d 233 (1999) (*rehearing en banc*), the Court of Appeals, *sitting en banc*, ruled that a defendant had waived his right to challenge the admissibility of a confession by pleading guilty, but a three-judge panel had previously reversed the conviction because a confession was obtained by a protective services worker accompanied by a police officer after counsel had been appointed for the accused (See 27 Va. App. 664, 500 S.E.2d 843 (1998)).

D. Medical Examinations and Forensic Photographs.

1. Physical or Sexual Abuse or Neglect (Va. Code Ann. §§63.2-1517 -1520).

When a child is examined in response to an allegation of abuse, especially in the hospital or emergency room, investigators need to obtain appropriate consent before the exam, treatment and evidence collection. Hospitals generally have consent forms developed specifically for this purpose and the staff can inform the child's caretaker (or child if he or she is old enough)

about the procedures to be carried out. Under certain conditions — one of which is that a child is in imminent danger — a child may be taken into protective custody by a local physician, law enforcement officer or child protective services worker. Va. Code Ann. §63.2–1517. A representative of the child protective services agency may then sign an appropriate consent form as the temporary guardian of the child to authorize the procedures.

Investigators also should seek permission for any photographs taken during the medical exam with the understanding they may be used as evidence. Photographs may be taken of known or suspected child abuse victims without parental consent and may be introduced in any “subsequent proceeding,” but may not be used in lieu of a medical evaluation. Va. Code Ann. §63.2–1520. Restrictions regarding the use of photographs may be imposed by the court. Investigators need to be sensitive to the child’s possible embarrassment about such photographs and make sure they are the least intrusive necessary to document the necessary findings.

## 2. Death of a Child (Va. Code Ann. §32.1–285.1).

The Code of Virginia requires an autopsy be performed on any infant whose death is suspected as being attributable to Sudden Infant Death Syndrome (SIDS). Va. Code Ann. §§32.1–285–285.1. The Board of Health has promulgated regulations providing exceptions to this requirement for objections based on bona fide religious beliefs.

## E. Forensic Analysis:

The following tests used by investigators have been held admissible in criminal proceedings:

- DNA profile evidence is admissible in any criminal proceeding. Va. Code Ann. §19.2–270.5. *See Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609 (1990) (finding DNA print identification test scientifically reliable).
- Electrophoretic tests are sufficiently reliable to be admissible. *See O’Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988) (declining to adopt the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), but nonetheless finding electrophoretic tests generally accepted by the scientific community).
- Human Leucocyte Antigen (HLA) blood tests are admissible. *See Bridgeman v. Commonwealth*, 3 Va. App. 523, 351 S.E.2d 598 (1986) (HLA blood tests admissible but insufficient to support an incest conviction when defendant and victim both denied sexual contact).

## F. Polygraph Tests (BACIGAL at §17–24; FRIEND at §14–7; BACIGAL, TATE & GUERNSEY at 252–253).

Results of polygraph tests are not admissible for the purposes of proving either guilt or innocence. *Odum v. Commonwealth*, 225 Va. 123, 301 S.E.2d 145 (1983) (polygraph tests found unreliable and inadmissible even though Commonwealth’s Attorney and defendant agreed to use the results of a test favorable to defendant). *See also Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159 (1986) (defendant may not impeach a Commonwealth witness with polygraph evidence);

*Crumpton v. Commonwealth*, 9 Va. App. 131, 384 S.E.2d 339 (1989) (defendant must have an opportunity to explain prior inconsistent statements when he had altered his statements at the end of a polygraph examination because the defendant's credibility was critical to the ultimate issue that must be determined by the jury).

G. Hypnosis (FRIEND at §14-8; BACIGAL, TATE & GUERNSEY at 102-103).

Witnesses are not allowed to testify regarding facts recalled during or as the result of pre-trial hypnosis. Witnesses, however, may testify to facts recalled prior to hypnotic sessions, but the party offering the facts remembered prior to hypnosis has the burden of proving that the facts were actually recalled before the witness submitted to hypnosis. *Hall v. Commonwealth*, 12 Va. App. 198, 403 S.E.2d 362 (1991). *See also Hopkins v. Commonwealth*, 230 Va. 280, 337 S.E.2d 264 (1985) (trial court has discretion to determine whether hypnosis made witness incompetent to testify). In *Hall* the Court recommended that any hypnosis session follow the established guidelines set forth in *State v. Hurd*, 432 A.2d 86 (N.J. 1981). These guidelines state: i) the hypnosis must be conducted by a psychiatrist or psychologist trained in hypnosis; ii) the conductor should be independent of either the prosecution or the defense; iii) information given to the conductor by the prosecution or defense prior to the session should be recorded in writing or other "suitable form;" iv) the conductor should obtain a detailed record of the facts from the subject as he or she remembers them prior to the session; v) all contacts between the conductor and the subject must be recorded; and vi) only the conductor and the subject should be present during the session. *Hall, supra.*, 12 Va. App. at 212, n.4, 403 S.E.2d at 371, n.4. *See also* discussion, *infra*, Chapter Four, part II.B.1., concerning the use of hypnosis on a defendant.

H. Arrest (Va. Code Ann. §19.2-81.3) (BACIGAL at §§2-1 through 2-6).

A law enforcement officer may arrest a person without a warrant who commits a crime in the officer's presence or a person whom the officer has probable cause or reasonable grounds to believe committed a felony not in the officer's presence. Va. Code Ann. §19.2-81. Additionally, an officer may arrest without a warrant a person who commits misdemeanor assault and battery not in the officer's presence, or for assault and battery against a family or household member and stalking in violation of a protective order. *Id.*; Va. Code Ann. §19.2-81.3. If a law enforcement officer has reasonable grounds to believe that a person has committed an assault and battery against, or has stalked a household member, the officer shall: i) upon request, transport or arrange to transport the victim to a hospital, safe shelter, or magistrate and ii) petition for an emergency protective order in every case in which the officer makes an arrest or has probable cause to believe a danger of family abuse exists. Va. Code Ann. §19.2-81.3.

*Caveat:* Prosecutors need to be aware that if they act as police investigators, they open themselves up to civil liability. *See Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990).

## II. The Role of Child Protective Services (JUVENILE LAW HANDBOOK ¶ 12.2)

Child Protective Services (CPS) workers are employees of a local Department of Social Services charged with investigation of child abuse or neglect committed in their locality. Va. Code Ann. §63.2-1503.

The governing statutes allow investigation by CPS only if the parent, guardian, or other person responsible for the child's care is the offender. *Id.* Once the department receives a complaint, CPS workers must either conduct a family assessment pursuant to the differential response system or investigate the complaint and determine within 45 days if the report is "founded" or "unfounded" and transmit a report to such effect to the central registry and to the person who is the subject of the investigation. However, upon written justification by the local department, the investigation may be extended, not to exceed a total of sixty days. Va. Code Ann. §63.2-1505. The findings pursuant to an investigation are defined as follows: "founded" means there is a preponderance of the evidence to establish that abuse or neglect occurred, and "unfounded" means there is insufficient evidence that abuse or neglect occurred. Virginia Department of Social Services, Child Protective Services, Vol. VII, Sec. III, Ch. A (October, 2002).

If CPS investigates and finds the complaint to be substantiated, it must offer services to the victim, the perpetrator, and other family members as appropriate.

CPS workers must report to the Commonwealth's Attorney, and the local law enforcement agency in the jurisdiction in which the alleged abuse is believed to have occurred, all cases involving: i) the death of a child; ii) any injury or threatened injury to a child in which a felony or Class 1 misdemeanor is suspected; iii) any sexual abuse, suspected sexual abuse or other sexual offenses involving a child; iv) any abduction of a child; v) any felony or Class 1 misdemeanor drug offense involving a child; or vi) contributing to the delinquency of a minor. Va. Code Ann. §63.2-1503. The department must then make available to the Commonwealth's Attorney and local law enforcement all of its records that relate to any complaints of abuse or neglect involving the victim or alleged perpetrator. *Id.* Similarly, law enforcement and other agencies are mandated to cooperate with the Child Protective Services Coordinator of the local Department of Social Services in "the detection and prevention of child abuse." Va. Code Ann. §63.2-1507.

As noted above, any statements made by a suspect to a CPS worker during an investigation after the suspect has been arrested are inadmissible in any criminal proceeding unless the worker has advised the accused of his or her *Miranda* rights. Va. Code Ann. §63.2-1503.M. During an investigation, any person who is mandated by statute to report or investigate suspected abuse may speak with the alleged child victim or his or her siblings without the permission of, and outside the presence of the child's parents or legal guardians. Va. Code Ann. §63.2-1518.

Interviewing techniques of social workers and police investigators have come under increasing scrutiny in recent years. Consequently, social workers and investigators must be aware of attacks that may likely be made at trial concerning leading questions, anatomical dolls, and videotaped interviews. For a thorough discussion of these issues, see MANUAL Chapter Two, part I, and MYERS at Volume 1, Chapter 1; Victor I. Vieth, "Defending the Investigative Interview," 12 *Update*, No. 2 (1999).

### **III. The Roles of Other Agencies (JUVENILE LAW HANDBOOK ¶ 12.2).**

To many prosecutors, the civil child protection system is foreign territory since city, county, or private attorneys pursue civil actions in juvenile and domestic relations district courts. However, prosecutors



need to understand generally how civil child protection laws work and what they can do to protect children.

A. Action By Physician, Protective Services Worker or Law Enforcement Official (Va. Code Ann. §63.2-1517).

A child may be taken into custody without a court order under certain circumstances. Under §63.2-1517 of the Code a physician, protective service worker, or law enforcement official investigating a report of child abuse and neglect may take a child into custody for up to 72 hours without prior approval of parent or guardians, provided: i) remaining in the present circumstances presents an imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result; ii) a court order is not immediately obtainable; iii) the court has set up procedures for placing such children; iv) the parents are notified as soon as practicable after the child is taken into custody; v) a report is made to the local department; and vi) the court is notified and the person or agency taking custody obtains an emergency removal order as soon as possible, but no later than 72 hours after the removal. If a preliminary removal order is issued within 72 hours, an emergency removal order is not necessary.

B. Civil Child Protection Proceedings (JUVENILE LAW HANDBOOK ¶ 12.3).

As defined by Va. Code Ann. §63.2-1505, civil child protection actions typically are initiated by the local department of social services filing a petition; however, individuals such as police officers, probation officers, or guardians ad litem also may initiate such proceedings. In all civil child protection actions, the court is required to appoint a qualified attorney to act as the child's guardian ad litem while the action is pending. The court has the power to provide the following types of protection for the child.

An *emergency removal order* (ERO) may be secured on an ex parte basis that removes a child from the custody of the parent or custodian to prevent a child being subjected to circumstances where injury or death might occur if he or she were left with the parent or custodian before a court hearing can be held. At the time an emergency removal order is requested, a petition alleging that the child is abused or neglected must be filed with the court, supported by an affidavit or sworn testimony in person before the judge or intake officer within 72 hours of the removal of the child or otherwise in accordance with §63.2-1517 of the Code. Va. Code Ann. §16.1-251. The petition must establish that i) the child would be subjected to an imminent threat to life or health, to the extent that severe or irremediable injury would be likely to result if the child were left in the custody of, or returned to, the parent or custodian pending a final hearing on the petition; ii) reasonable efforts have been made to prevent the removal of the child. If there is no reasonable opportunity to provide preventive services, reasonable efforts are deemed to have been made; and iii) there are no less drastic alternatives which could reasonably protect the child's life or health pending a final hearing on the petition. *Id.*

Once an ERO is entered, a *preliminary removal order* (PRO) hearing will be scheduled as soon as practicable, but no later than five business days. Va. Code Ann. §16.1-252. The scheduling

requirement has caused this hearing to be referred to frequently as the “five-day hearing.” Notice of the hearing, as well as a copy of the petition, must be given at least 24 hours in advance to the child’s parents or custodian, the guardian ad litem, and to the child if the child is 12 years of age or older. *Id.* If notice cannot be given despite reasonable efforts to do so, the hearing will still be held, and the parent(s) or custodian will then be provided a later hearing regarding the removal of the child if they make a motion for such hearing. For the court to maintain the child’s removal from the home, the department must prove, by a preponderance of the evidence, the same elements required to obtain an emergency removal. At the preliminary removal hearing, the court “shall determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence,” unless the parents or custodian, the guardian ad litem, or the petitioning department objects.

As an alternative to removal of the child from the home, a *preliminary protective order* (PPO) may be sought requiring the parent or guardian to “observe reasonable conditions of behavior for a specified length of time.” Va. Code Ann. §16.1–253. These reasonable conditions of behavior may include: i) abstaining from offensive conduct against the child; ii) cooperating in providing reasonable services or programs designed to protect the child’s life, health, or normal development; iii) allowing persons named by the court to enter the child’s home at reasonable times to visit the child or inspect the fitness of the home; iv) allowing visitation with the child by persons as determined by the court; v) refraining from acts tending to endanger the child’s life, health, or normal development; or vi) refraining from contact with the child as the court may deem appropriate, including leaving the child’s residence. An initial *ex parte* hearing may be held, which must be followed by a preliminary hearing within five working days. The court may grant a PPO if an affidavit or sworn testimony establishes that “the child would be subjected to an imminent threat to life or health to the extent that delay for the provision of the adversary hearing would be likely to result in serious or irreparable injury to the child’s life or health.” Va. Code Ann. §16.1–253(B).

These civil child protection proceedings may be going on while a criminal investigation is occurring or while charges are being sought.

### C. Multidisciplinary Coordination

Since 1975, the Virginia Code has provided that “[a]ll law-enforcement departments and other state and local departments, agencies, authorities and institutions shall cooperate with each child-protective services coordinator of a local department and any multi-discipline teams in the detection and prevention of child abuse.” Va. Code Ann. §63.2–1507. In addition, the Virginia Code section relating to child abuse and neglect states: “[t]he local department [of Social Services] shall foster, when practicable, the creation, maintenance and coordination of hospital and community-based multi-disciplinary teams that shall include where possible, but not be limited to, members of the medical, mental health, social work, nursing, education, legal and law-enforcement professions. Such teams shall assist the local departments in identifying abused and neglected children; *coordinating medical, social, and legal services for the children and their families;*

developing innovative programs for detection and prevention of child abuse; promoting community concern and action in the area of child abuse and neglect; and disseminating information to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat child abuse and neglect.” Va Code Ann. §63.2-1503 (f) (emphasis added).

The Children’s Justice Act Program, under the direction of the Virginia Department of Criminal Justice Services (DCJS), supports a variety of opportunities for communities to strengthen a multidisciplinary approach to child abuse cases. Information for multidisciplinary teams can be found on the DCJS website at: <http://www.dcjs.org/juvenile/cja/teams>. Communities in need of more information about receiving on-site training and technical assistance implementing a multidisciplinary approach should contact the Children’s Justice Act Program Coordinator at the Virginia Department of Criminal Justice Services.

#### **IV. Grand Juries (Va. Code Ann. §§19.2-191 to 19.2-215.11) (BACIGAL at §§12-1 through 12-7).**

The Commonwealth need only call enough witnesses to the grand jury to establish probable cause. *Britt v. Commonwealth*, 202 Va. 906, 121 S.E.2d 495 (1961). Therefore, it will not always be necessary to call the child victim as a witness. If a child does testify before a grand jury, however, prosecutors may need to use this testimony at trial to show prior consistent or prior inconsistent statements. Whether prosecutors can obtain a transcript or videotape of such testimony to use at trial is unsettled in Virginia. Transcripts of grand jury proceedings may be released to the prosecutor at the trial court’s discretion (*Vihko v. Commonwealth*, 10 Va. App 498, 393 S.E.2d 413 (1990)), and also might be available to the defendant if the transcript is in the prosecutor’s possession. See *Gibbs v. Commonwealth*, 16 Va. App. 697, 432 S.E.2d 514 (1993) (defendant may use a subpoena duces tecum to obtain writings or objects that are material to the proceeding even if they are not admissible).

Virginia law does not state specifically whether a prosecutor may use a grand jury transcript to impeach a witness. The law allows a grand juror to be called to testify at a perjury trial of a witness (Va. Code Ann. §19.2-192), or to testify on behalf of the accused that a government witness’s grand jury testimony is in direct conflict with trial testimony. *Harris v. Commonwealth*, 110 Va. 905, 68 S.E. 834 (1909). No Virginia court has specifically addressed the issue of whether the Commonwealth may impeach a recanting victim with grand jury testimony.